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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1168

WILLIAM KENNETH PARISH, *Petitioner,*
v.
COMMONWEALTH OF VIRGINIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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Petitioner William Kenneth Parish prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia entered in the above-entitled case on November 29, 1965.

CITATION TO THE OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia, printed in Appendix A hereto, *infra* p. 1a, is reported in 145 S.E.2d 192.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered on November 29, 1965, Appendix A, p. 1a, *infra.* Upon successive applications by petitioner, Mr. Justice Fortas granted Orders on February 11, 1966, and March 9, 1966, extending the time to file petition for a writ

of certiorari to and including April 1, 1966. Upon application of petitioner, Chief Justice Eggleston of the Supreme Court of Appeals of Virginia, granted an Order February 18, 1966, amending and extending the prior Order of that court staying execution of judgment—the amended Order providing that execution shall be stayed during any period of extension by this Court for the filing of a petition for writ of certiorari and until final determination of this Court if such a petition is timely filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) since petitioner's rights to due process of law and effective assistance of counsel guaranteed by the Constitution of the United States are drawn into question.

QUESTIONS PRESENTED

Whether petitioner was denied due process of law and assistance of counsel by the trial court's refusal to grant a continuance and forcing petitioner to trial one day after the preliminary hearing and return of the indictment when defense counsel stated that he was surprised by the prosecution evidence, had no opportunity to prepare for it, and proffered proof that a continuance would allow him to secure testimony from an out-of-state police witness which would prove the innocence of his client; and when the prosecution had been delayed for one year after the F.B.I. investigation without explanation and with no notice to petitioner of the charges?

Whether the petitioner was denied due process of law by his conviction of aiding in the concealment of stolen goods when no evidence of any participative act aiding in the concealment of stolen goods was shown, the evidence being limited to showing his association with a co-defendant and that he was present when the co-defendant shipped allegedly stolen merchandise?

CONSTITUTIONAL PROVISIONS INVOLVED

In all criminal prosecutions, the accused shall enjoy the

right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *Amendment VI, Constitution of the United States.*

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *Section 1, Amendment XIV, Constitution of the United States.*

STATUTE INVOLVED

Virginia Code § 18.1-107. *Receiving, etc., stolen goods.*— If any person buy or receive from another person, or aid in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted. *Volume 4, page 229, Virginia Code (1950 ed.)*

STATEMENT OF THE CASE

The petitioner was the subject of a four-count indictment returned by a grand jury in Charlottesville, Virginia, on March 11, 1964. (R. 3-4). Over his objection, he was forced to trial the next day, March 12, 1964. (R. 5, 10-11, 57). He was convicted under the third count of the indictment charging that the petitioner on *November 30, 1962,* "unlawfully and feloniously aided some evil disposed person to the Grand Jurors unknown in concealing clothing belonging

to Ed Michtom's (a clothing store in Charlottesville), of the value of more than $50.00, knowing the said clothing to have been stolen." (R. 3-5, 65). He was sentenced to six years' confinement in the penitentiary on March 12, 1964. (R. 5). The ruling of the trial judge on the motion for continuance was properly excepted to (R. 5, 11, 58) and petitioner filed an assignment of error May 11, 1964, in timely fashion, with assignment 12 alleging error in this ruling in view of the "preliminary hearing being held only one day prior to the Defendant's trial" and the "introduction of surprise evidence from Youngstown, Ohio, by the Commonwealth, precluding investigation by the Defendant of the validity of the evidence." (R. 8). On appeal, Appellant's question number 10 read "Did the Court's refusal to grant a postponement and its insistence on forcing the defendant to trial over his objection the day following his indictment amount to an abuse of discretion and cause a denial of his rights to effective assistance of counsel and the summoning of witnesses?" (Br. of Pft. in error, p. 7). The Supreme Court of Appeals of Virginia held the denial proper and that the request was not based upon substantial reason. (145 S.E. 2d at 195, Appendix A, *infra*, p. 1a, 15a).

With specificity, petitioner also contended in his Assignment of Error 1 that the prosecution had failed to prove the crime or that petitioner aided in the crime. (R. 6-7). This contention was also rejected by the Supreme Court of Appeals of Virginia.

The evidence was that two shipments of clothing were made from Virginia to Youngstown, Ohio. Both the trial court and the Supreme Court of Appeals of Virginia found the evidence sufficient to establish that the clothing was stolen. The shipments were intercepted and seized by a Youngstown police officer without a warrant because they were consigned to a person he regarded as a known "fence." (R. 33, 34, 35, 47, 48). Subsequently a warrant was secured and the two packages containing the clothing, a box and a

duffel bag, were opened by the police. (R. 37, 38). The Ohio policeman testified that *after* he received the packages, he conducted an investigation and got a search warrant. (R. 38). No objection or motion to suppress was lodged. Both shipments were made by one Pasanello. (R. 19, 26). On one of these occasions, Pasanello was accompanied by petitioner. (R. 19). On this occasion, petitioner "didn't pay for it [the package], didn't have it, he didn't sign for it . . .", his only act regarding the shipment being conversation concerning where the package was to be shipped. (R. 21, matter in brackets added). Following the shipment, petitioner and Pasanello drove away from the station in different cars. (R. 22). One witness testified that he had seen petitioner the evening of November 30th and the morning of December 1st with Pasanello in a store from which part of the clothing was thought to have been stolen. (R. 14). No other evidence linking petitioner with Pasanello or the shipments is contained in the record; the Supreme Court of Appeals of Virginia states facts in its opinion which are not supported by the record.[1]

Only two witnesses testified that they had ever seen petitioner in the company of Pasanello. One, Reece, a porter at the Virginia bus station, testified that petitioner and Pasanello came to the station at *about 5 p.m. on November 30th, 1962* (R. 23), that both left in separate cars, but driving in the same direction. (R. 22). He admitted that petitioner did not have the goods in his possession, did not pay for the shipment, sign for the shipment, and that his sole connec-

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[1] The opinion repeatedly states that petitioner registered at a hotel with Pasanello and he used an alias at that time (145 S.E. 2d at 194, 196; Appendix A, *infra* p. 3a, 8a). However the record reflects: (a) no identification of petitioner in this respect, and (b) that such evidence as was given was successfully objected to as hearsay. (R. 46). Further, the registration clerk of the hotel testified, but was not asked to identify petitioner, leaving the necessary conclusion that no identification was possible. The prosecution then attempted to prove that men "had registered and fitted the descriptions of two of the three men described by the employees of the stores." (R. 46).

tion with the shipment was conversation concerning where the shipment was to be sent. (R. 21). The other witness, Huffman, an employee of Ed Michtom's store in Charlottesville, testified that petitioner in the company of two men visited the store *after 7 p.m. on November 30th and the morning of December 1st, 1962* (R. 15), and that the two other men left the store during the visit and returned, but petitioner did not leave the store during the visit (R. 15), that he was positive that Pasanello was with petitioner on the occasion of the visits (R. 17), that it was not possible that he could be mistaken about the petitioner and Pasanello being together in the store on the dates indicated (R. 17), and that the time of the visit on *November 30th, 1962,* had to be *after 7 p.m.* (R. 18). Petitioner's counsel sought to introduce testimony from Raymond Pace, City Sergeant of the City of Charlottesville to show that it was impossible for petitioner and Pasanello to have been in Charlottesville together on November 30th and December 1st because Pasanello had been in Augusta, Georgia at that time, and that this was verified by police investigation in Georgia by officers who personally knew Pasanello. (R. 57). He sought to prove this by telegrams from the Georgia police reporting their investigation to the Virginia police because he had no prior notice of the prosecution evidence, could not prepare for it, and had been denied a continuance:

> We call upon the best evidence rules because faced with this and having moved for a continuance and having been denied, sir; and having had our motion to reduce this thing to a time limit overruled; that where a law enforcement officer, an officer and arm of this Court who is in possession of information which would show the Defendant at bar to be innocent of the charge against him; and to show the witnesses of the Commonwealth to be mistaken. To fail to permit this evidence to come in, sir, would be a gross miscarriage of justice. (R. 57).
>
> . . . This shows that it would be impossible for him to

> have been in the store with Kenneth Parish on the evening of November 30th and the morning of December 1st because he was five hundred miles away from here.
>
> The Court: Well now, this evidence is certainly not admissible in this form.
>
> Mr. Smith: I had no way in which to prepared (sic) for this, sir, based upon the fact that the time element has become essential yesterday and today. (R. 58).

The trial judge ruled the evidence out and did not grant a continuance. Petitioner's counsel excepted to the ruling. (R. 58).

Prosecution witnesses testified that the F.B.I. investigated the shipments a "couple of days" after they occurred (R. 21), but no explanation for the prosecutorial delay for a year before arrest warrants were issued was given.

The petitioner elected a non-jury trial (R. 5) before the trial judge who had tried Pasanello the previous day (R. 10-12), was found guilty and sentenced to six years' confinement in the penitentiary. (R. 5). The conviction was affirmed on appeal. (145 S.E.2d at 200, Appendix A. *infra,* p. 15a.)

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the interpretations of this Court concerning an accused's right to the assistance of counsel. It is in direct contradiction to the fundamental constitutional principle that the right to counsel includes as a necessary incident an opportunity to prepare for trial. Quoting a lower court, Mr. Justice Sutherland's landmark opinion in *Powell* v. *Alabama,* 287 U.S. 45 (1932) stated the principles which the court below ignored:

> It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case. *Id.* at 59.

Despite the petitioner's insistence on this point, the courts below chose to ignore completely the constitutional issue

as though none existed. The arguments of petitioner and the long line of decisions of this Court were apparently without weight.[2] When the prosecution is delayed for sixteen months after the offense because of the actions of the prosecutor, including a delay of approximately twelve months before even giving notice to the accused of the charge, an insistence upon immediate trial one day after indictment to prevent defense preparation is to reduce *justice to a mask.*

> The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob. *Ibid.*

The right to have counsel who is afforded ample opportunity to prepare a defense is so fundamental that due process requires its observance "regardless of the merits of the case." *Powell* v. *Alabama,* 287 U.S. 45, 59. However, the petitioner's trial denied him the opportunity to secure the testimony of out-of-state police officers which would have shown the prosecution witnesses to have made mistaken identifications of the petitioner. Under such circumstances, the right to counsel, perhaps the most basic element of the constitutional requirement of due process of law, was denied. It is important for lower courts in this country to be afforded guidance by this Court's reaffirmation of *Powell* v. *Alabama, supra.*

2. The decision below raises the question whether the charges against petitioner were so totally devoid of evi-

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[2] Avery v. Alabama, 308 U.S. 444, Smith v. O'Grady, 312 U.S. 329, White v. Ragan, 324 U.S. 760; Chandler v. Fretag, 348 U.S. 3; Darcy v. Handy, 351 U.S. 454; Ungar v. Sarafite, 376 U.S. 575. See also, United States v. Helwig, 159 F.2d 616, 618 (3d Cir. 1947); Melanson v. O'Brien, 191 F.2d 963 (1st Cir. 1951); McBee v. Bomar, 296 F.2d 235, 237 (6th Cir. 1961); Townsend v. Bomar, 351 F.2d 499 (6th Cir. 1965).

dentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. Decision of this question turns not on the sufficiency of the evidence, but on whether the conviction rests upon any evidence at all. *Thompson* v. *Louisville,* 362 U.S. 199. The decisions of this Court require that one who is an "aider and abettor" must "assist the perpetrator of the crime.", and establish that "[t]o be present at a crime *is not evidence* of guilt as an aider and abettor." *United States* v. *Williams,* 341 U.S. 58, 64, n.4. (Underlining added.) And therefore, the acquittal of defendants of the crime of aiding and abetting the assault of state prisoners was not a determination that the defendants were not present and did not see the beating. *Ibid.* As eloquently pointed out by Mr. Justice Frankfurter, it is the special boast of our society that guilt be established on the basis of personal responsibility, but not by association. *Nye & Nissen* v. *United States,* 336 U.S. 613, 626. (Dissent.) The guiltless bystander must not be convicted upon a dragnet concept of guilt or a general sense of suspicion due to association. These concepts are admittedly of fundamental importance.

The court below found guilt of aiding the concealment of stolen goods precisely upon such grounds:

> Since the defendant and Pasanello appeared together in Lynchburg in possession of stolen goods, [the record shows that only Pasanello possessed the goods] it would have been proper for the trial court to infer that they participated in secreting the clothing out of Charlottesville. . . .
>
> The relationship of these men to each other was a crucial issue in the case and their association together, wherever such association may have occurred around the time of the offense, was relevant and material to the issue on trial.
>
> The evidence in question tended to establish the necessary ingredients of the offense with which the defendant was charged. Not the least of these elements

> was the defendant's dishonest intent in aiding in the concealment of the goods, which the Commonwealth was required to prove. Such an intent not only may, but usually must, be shown by circumstantial evidence. The circumstances of the Lynchburg transaction constitute evidence of the defendant's dishonest intent. 145 S.E.2d at 198, Appendix A, *infra*, p. 11a. [Matter in brackets added.]

The sole testimony regarding the "Lynchburg transaction" was one witness' testimony that petitioner, although he did not possess the goods and did not pay or sign for the goods, did enter into conversation regarding where the goods were to be shipped and was "anxious" to get them off. The goods were stated to be clothing at the time and no concealment was established at all. The only other "association" shown was petitioner's presence in a Charlottesville store with Pasanello. However, the testimony was that this occurred later in the day of November 30th *after* the shipment from Lynchburg. Thus the presence at Lynchburg was not evidence of criminal actions. *Hicks* v. *United States,* 150 U.S. 442, 447, 450. Further, the United States Courts of Appeal for the Eighth Circuit and the District of Columbia Circuit have both held that "sympathetic presence" is not the aiding and abetting of crime. *Johnson* v. *United States,* 195 F. 2d 673, 675 (8th Circuit 1952), *Kemp* v. *United States,* 114 U.S. App. D.C. 378, 311 F.2d 774 (1962).[3]

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[3] It may be appropriate to note here the vital importance that constitutional claims such as presented by the instant case be determined by direct review through certiorari rather than by subsequent collateral proceedings in habeas corpus. The latter procedure, costly and time-consuming, is unlikely to be available unless petitioner is confined. Although this Court held in Jones v. Cunningham, 371 U.S. 236 that habeas corpus is available to one on parole, it appears that bail is not available to one seeking relief of his sentence by habeas corpus. See 4 American Criminal Law Quarterly 56 (Fall 1965). The Kemp case, which involved petitioner's present Washington counsel, reveals the inequity of such delay dramatically. Kemp served two years' confinement before winning his per curiam reversal and release from the one to three year sentence. See Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, 108-110 (1963).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

WILLIAM KENNETH PARISH

v.

COMMONWEALTH OF VIRGINIA.

Supreme Court of Appeals of Virginia.

Nov. 29, 1965.

Before EGGLESTON, C. J., and SPRATLEY, BUCHANAN, SNEAD, I'ANSON, CARRICO and GORDON, JJ.

CARRICO, Justice.

This case is companion to that of *Pasanello v. Commonwealth,* 145 S.E.2d 200, Record No. 6086, this day decided.

William Kenneth Parish, the defendant, was indicted by the grand jury upon four counts involving the theft and disposition of certain articles of clothing. He was tried by the court, without a jury, and was found guilty of the offense charged in the third count of the indictment. A sentence of six years in the penitentiary was imposed upon the defendant and he is here upon a writ of error awarded by this court.

The third count of the indictment alleged that the defendant, on November 30, 1962, unlawfully and feloniously aided "some evil disposed person to the Grand Jurors unknown" in concealing clothing belonging to Ed Michtom's (a men's clothing store in Charlottesville), of the value of more than

$50.00, knowing the said clothing to have been stolen. (Code, § 18.1-107.)[1]

The evidence in this case differs somewhat from that presented in the Pasanello case (Record No. 6086) and will, therefore, be fully set out here.

The evidence shows that in the latter part of 1962, Ralph Gaudio, "noted as a *'fense'* ", inquired of Richard J. Baughman, an employee of a bus terminal in Youngstown, Ohio, concerning "express shipments coming out of Virginia." The shipments were identified by Gaudio as a duffel bag and a large cardboard box, consigned either to Allen Lee or Bill Moore.

After Gaudio departed, a police officer inquired of Baughman about the purpose of Gaudio's visit. Upon being informed of such purpose, the officer advised Baughman to notify the police immediately "if these particular shipments * * * came in."

Some time later, Baughman received a duffel bag consigned to William Moore, shipped under the name of William Lewis from Charlottesville, Virginia. He also received a large cardboard carton consigned to Allen Lee, shipped under the name of Allen Lee from Lynchburg, Virginia.

The duffel bag and the cardboard carton were turned over by Baughman to the Youngstown police department. The police, acting under a search warrant, examined the contents of the packages. Each was found to contain large quantities of clothing, some bearing labels of Ed Michtom's. The duffel bag contained five men's suits from Michtom's, as well as two ladies' coats, one of them bearing the label of Miller and Rhoads. The cardboard carton contained five suits from Michtom's, together with men's and ladies' clothing from several other stores in Charlottesville.

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[1] § 18.1-107. *Receiving, etc., stolen goods.*—If any person buy or receive from another person, or aid in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted."

The Youngstown police, "following communications with the local FBI office and the Charlottesville Police Department * * * received a confirmation from the Charlottesville Department that the items were stolen in" Charlottesville. The contents of the duffel bag and cardboard carton were forwarded to the Charlottesville police.

John G. McCarthy, a special agent of the Federal Bureau of Investigation, conducted an investigation in Charlottesville. He found that at 7 p.m. on November 29, 1962, the defendant, employing the alias of Jack R. Baker, and Lewis R. Ziogio, registered at a local hotel. The defendant gave a Richmond, Virginia, address and Ziogio a Brunswick, Georgia, address. The two men "indicated that they were to be joined by a third individual and decided to reserve three separate rooms." Pasanello also registered at the same hotel on the same night, listing on his registration a Las Vegas, Nevada, address and a Cadillac automobile with California license plates.

McCarthy obtained descriptions "from clerks and owners of the various local stores whose clothing appeared in the bundles" recovered in Youngstown. He also secured "approximately thirty photographs of individuals in the Los Angeles area" and recent photographs from the identification division of the FBI. The photographs of the defendant and Pasanello were identified by the personnel "in the various stores" as fitting the descriptions of two of the "three men who were previously unknown in each of the stores."

Several employees of the Michtom store were called as witnesses by the Commonwealth. One of them testified that he had observed the defendant, Pasanello and an unidentified third person in the store together on two occasions during the latter part of November or the first part of December, 1962. Another employee stated that the defendant and "other persons with him" were in the store during "the latter part of 1962." A third employee testified that the defendant was in the store "on more than one occasion"

in the latter part of 1962, accompanied on one visit by one person. These witnesses also testified to the suspicious circumstances under which the defendant and the other two men visited the store.

The ticket agent of the Trailways bus terminal in Charlottesville testified that Pasanello, at 11:40 a.m. on November 30, 1962, shipped a duffel bag to Youngstown, Ohio. The shipping ticket, identified by the agent and admitted as an exhibit, showed that the duffel bag contained clothing and that it was consigned to William Moore from William Lewis.

An employee of the Trailways bus terminal in Lynchburg was called as a witness by the Commonwealth. He testified that the defendant and Pasanello, some time between 4 p.m. and 6 p.m. on November 30, 1962, shipped a box containing clothing to Youngstown, Ohio, consigned to Allen Lee from Allen Lee. This witness observed the defendant and Pasanello leaving the bus station, one in a Cadillac automobile and the other in a Chevrolet, both driving in the same direction.

The general baggage and express agent of the Trailways Company testified that only one package was shipped from Charlottesville to Youngstown and only one package from Lynchburg to Youngstown on November 30, 1962.

The first contention of the defendant with which we must deal relates to his twelfth assignment of error. There he claims the court erred in denying him a continuance.

Warrants were issued for the arrest of the defendant and Pasanello in November of 1963. The warrant against the defendant was not executed. However, Pasanello was arrested immediately and he gave bond for his appearance in court. A preliminary hearing was held in Pasanello's case on November 26, 1963, and he was bound over to the grand jury, by which he was indicted at the December, 1963, term.

Pasanello's case was set for trial in the corporation court on March 11, 1964. On February 17, 1964, the defendant's

privately retained counsel, who also represented Pasanello, entered into an agreement with the Commonwealth's Attorney and the court to set the defendant's trial for March 12, 1964, the day following Pasanello's trial date.

The defendant submitted himself for a preliminary hearing in the municipal court on March 11 at which time he was held for action of the grand jury. A special grand jury met later on the same day and indicted the defendant. When he appeared in the corporation court the next morning, March 12, his counsel moved for a continuance of the case, which the court denied.

The defendant now says that all he requested of the trial court was a postponement of the case, rather than a continuance, which, he asserts, "should be more liberally granted than continuances and that the rules with respect to continuances do not apply to postponements."

However, the record shows that the very language of the defendant's counsel was, "I would like to formally move for a continuance in this matter." The order of the court recited that "the defendant, by counsel, moved the Court for a continuance."

This question, then, is to be determined by the rules applying to continuances. Under those rules, the granting or denying of a continuance lies within the sound discretion of the trial court and we will not interfere with its action unless it is clear that such discretion has been abused. *Wansley* v. *Commonwealth,* 205 Va. 419, 421, 137 S.E.2d 870.

Does such abuse of discretion appear in the record before us?

The defendant agreed with the Commonwealth's Attorney and the court for his case to be tried on March 12. As a result of that agreement, the defendant was not arrested and placed in jail, or required to give bond, while awaiting trial. He received the fruits of the agreement and should not be heard to complain unless he had some substantial reason upon which to ground his request for a continuance.

No such reason was advanced by the defendant to the trial court. His request appeared to have been based upon nothing more than his counsel's concern over the fact that stronger evidence had been presented against Pasanello the day before than had been presented in the Pasanello preliminary hearing. His counsel admitted, however, that he had been "told that there was additional evidence."

The defendant did not suggest to the trial court that there was testimony of witnesses, or evidence in any other form, which he could secure if a continuance was granted. To the contrary, his request for a continuance, in the words of his counsel, was based upon his desire "to sort of retreat, regroup and be in a little better position to try the matter." In other words, it appears that the defendant sought a continuance for the mere sake of delay.

Under these circumstances, we find that there was no abuse of discretion on the part of the trial court in denying the motion for a continuance.

The defendant's principal contention is that the evidence was insufficient to prove the corpus delicti and to sustain the conviction.

To prove the corpus delicti and to establish the guilt of the defendant, the Commonwealth had the burden of showing four elements, namely: (1) that goods of the value of more than $50.00 were previously stolen from the Michtom store by some other person; (2) that the defendant aided in concealing them; (3) that at the time he so aided in concealing them, he knew they had been stolen, and (4) that he so aided in concealing them with a dishonest intent. *Longman v. Commonwelath (sic)*, 167 Va. 461, 464-465, 188 S.E. 144; *Patterson v. Commonwealth*, 165 Va. 734, 736, 181 S.E. 281.

The defendant first contends that the Commonwealth did not sufficiently identify the suits in question so as to prove ownership thereof by Ed Michtom's at the time of the alleged theft and did not establish the value of the suits.

We find this contention to have no substance.

One of the store employees who testified for the Commonwealth said of one of the suits found in the duffel bag, "* * * it belongs to Ed Michtoms." The witness pointed out certain labels and tickets on the suit to corroborate his identification. The Commonwealth's Attorney then presented a second suit from the duffel bag and asked the witness if he could identify it in the same manner. Counsel for the defendant then stated, "Mr. Camblos (the Commonwealth's Attorney), this is exactly what I would have stipulated to you." The Commonwealth's Attorney, acting upon counsel's statement, then offered all five of the suits from the duffel bag into evidence and they were admitted without objection from the defendant.

When the suits found in the cardboard box were presented to the witness, counsel for the defendant stated that he would stipulate that the suits were "at one time in the stock of Ed Michtoms." The Commonwealth's Attorney then proved by the witness that the suits were not sold by the store and that their value exceeded $50.00. The suits were then admitted into evidence without objection by the defendant.

The defendant next contends that it was not shown that the goods were stolen; that he aided in concealing them; that he knew they were stolen, and that he acted with dishonest intent. We are of opinion that the evidence sufficiently established these necessary elements of the offense.

The evidence of the Commonwealth and the stipulations of the defendant showed, as has been noted, that the suits were owned by the Michtom store at the time of the alleged theft. The evidence of the Commonwealth fully established that the suits did not leave Michtom's possession as the result of a sale by the store.

The defendant registered at the local hotel early in the evening of November 29, 1962, the night before the shipments of clothing were made. He used the name of Jack R.

Baker, an alias known to be employed by him because he had been "arrested in New Jersey and fingerprinted under that name." Ziogio registered at the hotel with the defendant and the two "indicated that they were to be joined by a third individual." Later in the same evening Pasanello registered at the same hotel.

The defendant, although he gave a Richmond, Virginia, address when he registered at the hotel, was identified from a group of thirty photographs "of individuals in the Los Angeles area." Pasanello, although he gave a Las Vegas, Nevada, address, was driving a Cadillac automobile registered to him at a Hollywood, California, address. Pasanello was identified from recent photographs obtained from the FBI files. The defendant and Pasanello were identified by the "clerks and owners of the various local stores whose clothing appeared" in the duffel bag and the cardboard carton recovered in Youngstown as being two of the three men "who were previously unknown in each of the stores."

The defendant, in the company of Pasanello and an unidentified third person, was observed in the Michtom store on several occasions around the time the shipments of clothing were made. The defendant, using another alias, Bill Williams, and asserting that he was in the construction business in Richmond, pretended to be interested in purchasing clothing, although in the end he bought nothing. The three men did not remain together in the store and Pasanello and the unidentified third person left the store "for a short while" and returned.

Five of the suits were shipped by Pasanello from Charlottesville to a known "'*fense*', a dealer in stolen goods, primarily clothing" in Youngstown. Five more suits belonging to Michtom's were shipped by the defendant and Pasanello to the same "fence" from Lynchburg. In each instance, the shipment was made under a false name to a false consignee. The "fence", at the time of the defendant's trial, was a fugitive from justice, under a sentence of one

to seven years imposed upon him in Youngstown, Ohio, upon a charge of receiving stolen property.

With respect to the shipment of clothing from Lynchburg, there was positive evidence that the defendant and Pasanello both participated "in this transaction with the people around the bus terminal"; that they together "shipped a box to Youngstown, Ohio"; that they "had it shipped" at the Trailways terminal, and that "they said" there was clothing in the box.

Under these circumstances, the conclusion is fully warranted that the clothing in question was removed from the Michtom store by some unidentified person as the result of a larcenous plan and design, participated in by the defendant, Pasanello and other "evil disposed persons", acting in concert. As a part of that plan and design, the stolen goods were secreted out of Charlottesville and shipped to another state for disposition by a dealer in stolen merchandise. By assisting in carrying out that part of the plan, the defendant, with guilty knowledge and a dishonest intent, aided in concealing the stolen goods. *Snyder* v. *Commonwealth,* 202 Va. 1009, 1016, 121 S.E.2d 452; *Tasker* v. *Commonwealth,* 202 Va. 1019, 1026, 121 S.E.2d 459.

The defendant contends, however, that his conviction was secured upon improperly admitted evidence which, he says, requires us to reverse the judgment of the trial court. He also complains of the failure of the court to admit certain evidence offered by him.

The defendant first argues that the court erred in admitting the evidence relating to the shipment by Pasanello of the duffel bag from Charlottesville to Youngstown.

In *Boggs* v. *Commonwealth,* 153 Va. 828, 836, 149 S.E. 445, 447, it is stated, "'* * * everyone connected with carrying out a common design to commit a criminal act is concluded and bound by the act of any member of the combination, perpetrated in the prosecution of the common design. * * *'"

"This is true though the defendant was not present when

the act was committed.'' 21 Am.Jur.2d Criminal Law, § 132, p. 203.

Pasanello's shipment of the duffel bag was part and parcel of the common plan and design, employed to secrete the stolen goods out of Charlottesville and into the hands of the ''fence'' in Ohio. That being so, and the defendant and Pasanello being members of the combination involved in the common design, the defendant was ''concluded and bound'' by Pasanello's action, even though he was not then present. It was not error, therefore, to admit the evidence relating to the Pasanello shipment.

The defendant's next contention is that it was improper to admit the evidence relating to the shipment of clothing from Lynchburg. The Charlottesville court, the defendant says, had no jurisdiction over an offense committed in Lynchburg. The defendant also argues that the disputed evidence constituted a fatal variance with the indictment and was irrelevant and immaterial.

This contention is without merit. When goods are stolen and concealed, it is proper to show the connection of the accused therewith wherever they may be traced. Since the defendant and Pasanello appeared together in Lynchburg in possession of the stolen goods, it would have been proper for the trial court to infer that they participated in secreting the clothing out of Charlottesville. That act of secretion related directly to the offense of aiding in concealing stolen goods in Charlottesville, an act clearly under the terms of the indictment and within the jurisdiction and venue of the trial court.

But, regardless of the identity of the person who secreted the goods out of Charlottesville, that act was performed pursuant to the common plan and design of which the defendant was a part. The defendant was ''concluded and bound'' by the act of whatever person removed the goods from Charlottesville.

The disputed evidence directly linked the defendant with

Pasanello and in turn linked them with the stolen goods. The relationship of these men to each other was a crucial issue in the case and their association together, wherever such association may have occurred around the time of the offense, was relevant and material to the issue on trial.

The evidence in question tended to establish the necessary ingredients of the offense with which the defendant was charged. Not the least of these elements was the defendant's dishonest intent in aiding in the concealment of the goods, which the Commonwealth was required to prove. Such an intent not only may, but usually must, be shown by circumstantial evidence. The circumstances of the Lynchburg transaction constituted significant evidence of the defendant's dishonest intent. *Longman* v. *Commonwealth, supra,* 167 Va., at pp. 466-467, 188 S.E. 144.

The defendant next argues that because the indictment alleged that the offense occurred on November 30, 1962, and that because it was shown that the shipments of clothing were made during the daytime on that date, it was improper to admit evidence concerning his activities after the shipments occurred. The defendant cites the testimony of one of the store employees who testified that "to the best of [his] knowledge" the defendant, Passanello (sic) and the unidentified third person were in the store during the evening of November 30 and the morning of December 1.

The defendant contends that because of the confusion in dates resulting from the evidence in question, the time of the commission of the offense was not shown.

This contention is without merit. If any confusion exists, it is in the defendant's argument that the lack of evidence concerning the time of the theft of the goods constituted a fatal weakness in the proof of the charge against him.

It should be borne in mind that the offense here under review is that of aiding in concealing stolen goods, and not the actual theft thereof. While it is true that the exact time of the theft was not fixed, it is obvious that the goods were

stolen before they were shipped to Ohio. The evidence conclusively showed that the shipments were made on November 30, 1962, and thus it was fully established that the defendant aided in concealing the goods on that date, as alleged in the indictment.

The defendant says that the admission of the disputed evidence resulted in a fatal variance with the indictment.

If it be assumed that such evidence tended to prove the commission of a crime on a date other than that set forth in the indictment, that variance did not render the indictment invalid nor make the defendant's conviction illegal.

Code, § 19.1-172 states that "No indictment * * * shall be * * * deemed invalid * * * for omitting to state, or stating imperfectly, the time at which the offense was committed when time is not the essence of the offense."

And in *Stapleton* v. *Commonwealth,* 140 Va. 475, 488, 124 S.E. 237, 241, it is stated that "it is well understood, that the commonwealth may prove the commission of the crime charged on a date different from that alleged, and sustain a conviction thereof." See also *Harris* v. *Commonwealth,* 185 Va. 26, 34, 37 S.E.2d 868; 9 Mich.Jur., Indictments, Informations and Presentments, § 34, p. 683; 52 C.J.S. Larceny § 103, p. 921, at p. 922.

The defendant also says that the evidence in question was irrelevant and immaterial because the fact that he was in the Michtom store during the evening of November 30 and the morning of December 1 constituted no proof of criminal activity with regard to the goods which already had been shipped before such visits.

But the evidence of the store employee, which tended to indicate that the defendant and his associates were in the store after the shipments were made, did not bind the Commonwealth to the theory that the goods could have been stolen only during those alleged visits. This employee testified more than sixteen months after the occurrences in question, and his testimony was based upon "the best of [his]

knowledge", rather than upon written memoranda. Although he testified that the evening visit was on a Friday, he admitted he had not looked at a calendar to confirm the date.

Moreover, one of the other employees, although he stated that he observed the defendant in the store "with other persons * * * in the latter part of 1962", did not "know exactly * * * when it was that they were there." The third employee stated that he saw the defendant in the store "on more than one occasion." He said that "on one occasion * * * there was one person" with the defendant and he placed that visit "on a Friday evening, the latter part of November * * * I am not exactly sure of the date * * * at the time * * * I felt like I had seen him alone before."

Thus, under the circumstances, it would have been proper for the trial court to infer that one or more of the visits to the store by the defendant and his associates took place before the shipments were made.

But, even if it be assumed that no one could place the defendant and his accomplices in the store before the shipments were made, that was not destructive of the Commonwealth's case. Nor was the Commonwealth obligated to explain why the men visited the store after the shipments took place, if that was the situation. Only the defendant and his friends could have made that explanation and they have chosen not to do so.

The defendant and his associates were, according to the evidence, in Charlottesville on at least three days in the latter part of November, 1962, around the time of the theft. What they did with relation to the Michtom store during that period, whether before or after the shipments were made, was relevant and material to proof of the charge against the defendant.

The next contention of the defendant is that the court erred in refusing to admit into evidence two telegrams offered by him.

The defendant called to the stand, as his only witness, Raymond C. Pace, the city sergeant of Charlottesville. The defendant sought to prove by this witness the contents of two telegrams received by him from Augusta, Georgia. Counsel for the defendant told the court that "these telegrams advise that the Sheriff's Department (in Augusta) has ascertained that Pat *Pesancello* checked in at the Holiday Inn at 4:08 a.m. December 1, 1962. That night it was investigated by the Sheriff's Department and it was ascertained that that was true and a verification is from Mr. J. D. Graves, Augusta Georgia Western Union."

The defendant argues that the telegrams should have been admitted because their contents directly refuted "the testimony of all the witnesses who identified Pasanello as being in Virginia on November 30, and December 1, 1962, [and] would have weakened their testimony."

The defendant concedes that the telegrams were hearsay evidence but he does not point to any exception to the hearsay rules that would permit their introduction. Nor does he offer us any sound reason why the rules against such evidence should be here abrogated. It was not error to refuse the offered evidence.

The defendant's final contention is that the court erred in not granting his motion to set aside the judgment. What has already been said should be sufficient to dispose of this contention. But it would not be amiss to say that the defendant's real complaint in this case is that his conviction should not stand because "the question of time has been so poorly proven" and because no one could testify that the defendant and his associates "removed a single item from the store."

It is not surprising, and certainly not fatal to the Commonwealth's case, that no one was able to say at exactly what moment the larceny took place. And it is not an unusual situation that no witness was able to tell by what precise method the goods were removed from the store.

Thieves do not usually leave timetables and blueprints of their activities behind them, to chart their prosecutions after they are apprehended.

All that the Commonwealth was required to do under its burden of proof was to establish, beyond a reasonable doubt, the essential elements of the offense of aiding in concealing stolen goods. This the Commonwealth sought to do by circumstantial evidence. When, as here, such evidence is of a convincing character and excludes every reasonable hypothesis other than that the accused is guilty, there is no ground upon which this court may, or will, disturb the judgment of the trial court. *Wright* v. *Commonwealth,* 196 Va. 132, 137, 82 S.E.2d 603; *Dean* v. *Commonwealth,* 32 Gratt. (73 Va.) 912, 926.

We find no error in the conviction of the defendant. Accordingly, the judgment of the trial court will be

Affirmed.